

1 Honorable Mary Alice Theiler
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE
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WILLIAM MICHAEL KRAL,)
vs.) Plaintiff,)
KING COUNTY, a Washington municipal)) NO. 10-01360 MAT
corporation, and WASHINGTON)) PLAINTIFF'S MOTION FOR
ASSOCIATION OF SHERIFFS AND)) PARTIAL SUMMARY
CHIEFS OF POLICE, a Washington)) JUDGMENT
corporation,))
Defendants.

NOTE FOR MOTION
CALENDAR: FRIDAY,
JANUARY 20, 2012

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13 Plaintiff respectfully brings this motion for partial summary judgment
14 against Defendants King County and Washington Association of Sheriffs and

PLAINTIFF'S MOTION FOR
FOR SUMMARY JUDGMENT - 1

DISABILITIES LAW PROJECT
1120 E. Terrace St. Suite 100
Seattle, WA 98122-7405
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1 Chiefs of Police on the issue of their liability for violation of Plaintiff's civil rights
2 under the Americans With Disabilities Act and the Washington State Law Against
3 Discrimination. Because Mr. Kral is deaf, Defendants refused to allow him to
4 participate in electronic home monitoring. As a result he had to spend additional
5 time in the King County jail when he could have been at home under monitoring.

6 **ISSUES**

- 7 1. Is Plaintiff entitled to partial summary judgment on his ADA claim against
8 King County?
9 2. Is Plaintiff entitled to partial summary judgment on his state law claim
10 against King County?
11 3. Is Plaintiff entitled to partial summary judgment on his ADA claim against
12 Washington Association of Sheriffs and Chiefs of Police?
13 4. Is Plaintiff entitled to partial summary judgment on his state law claim
14 against of Sheriffs and Chiefs of Police?

15 **EVIDENCE RELIED UPON**

16 Plaintiff relies upon the pleadings on file in ghis case and upon the
17 declarations filed in support of his motion for partial summary judgment.

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FACTS

2 Dale McMillan was a case manager for the Washington Association of
3 Sheriffs and Chiefs of Police (WASPC). McMillan Dep at 9:10-11. He worked
4 with electronic home monitoring McMillan Dep at 9:13-16 He received a fax from
5 the District Court advising him that Plaintiff was eligible for electronic home
6 monitoring. Dep. at 10:22-25. Plaintiff was to serve 120 days of electronic home
7 monitoring Dep 12: 9-10. WASPC charges for services 11:16-17. Plaintiff would
8 have to pay a fee to WASPC in order to participate in electronic home monitoring.
9 Dep 12:14-16. Plaintiff would have been on electronic home monitoring and on a
10 breathalyzer. Dep 13:7-9. McMillan became aware Plaintiff was deaf when he was
11 interviewed in jail. Dep 15:24-25 – 16:1. McMillan sent a fax to the District Court
12 which said Plaintiff is deaf “and will not be able to be put on EHM or BAC for that
13 reason.” Dep Ex 4. McMillan told Plaintiff that, unless he had another person at
14 home to answer the telephone, Plaintiff could not take part in electronic home
15 monitoring. Dep 36:10-13. McMillan made no effort to find out how the
16 Americans With Disabilities Act might have to do with Plaintiff’s case. Dep. 33:
17 15-19, 35:4-9. WASPC selected the equipment that was used in electronic home
18 monitoring. Dep. 37: 16-17. McMillan made no efforts to find alternative

1 equipment. Dep. 39: 4-5. McMillan used the equipment because it was all that
2 WASPC had. Dep. 39: 14-16.

3 McMillan described the role of video cameras in home electronic monitoring
4 but said Plaintiff could not use the video camera system because he could not
5 receive a phone call. Dep. 41:22 – 42:17. McMillan did not know whether
6 captioning could have been used with electronic home monitoring equipment. Dep.
7 44:7-13.

ARGUMENT

Summary judgment standard

10 According to Fed.R.Civ.P. 56)(c), summary judgment is proper if “the
11 pleadings, depositions, answers to interrogatories, and admissions on file, together
12 with the affidavits, if any, show that there is no genuine issue as to any material
13 fact and that the moving party is entitled to judgment as a matter of law.” A
14 “genuine issue” exists where the evidence before the court is of such a nature that a
15 reasonable jury could return a verdict in favor of the non-moving party. A mere
16 “scintilla” of evidence is not enough to defeat summary judgment. Instead, there
17 must be evidence upon which a jury could reasonably find in the non-moving
18 party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986). A fact

1 is “material” if it hinges on the substantive law at issue and if it may affect the
2 outcome of the case. Id. at 248. The moving party must first make a *prima facie*
3 showing that summary judgment is appropriate under Rule 56. The moving party
4 can meet its burden by pointing out the absence of evidence of a genuine issue of
5 material fact. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). When the
6 moving party meets its burden, the burden then shifts to the non-moving party to
7 show by affidavit or otherwise that a genuine issue of material fact exists.
8 *Matsushita Elec. Indus. Co.v. Zenith Radio Corp.*, 475 U.S. 574 586 (1986). The
9 evidence of the non-moving party will be believed as true, all doubts will be
10 resolved in favor of the non-moving party, and all reasonable inferences will be
11 drawn in the non-moving party’s favor. *Hunt v. Cromartie*, 526 U.S. 541, 550-55
12 (1999).

13 **WSLAD Claims**

14 **Plaintiff has established a *prima facie* case under RCW 49.60.030.**

15 Washington law recognizes that discrimination against a person based on
16 disability is a menace to the foundations of a free democratic state. RCW
17 49.60.010. The Washington State Law Against Discrimination (WSLAD) is to be
18 liberally construed. RCW 49.60.020. According to RCW 49.69.030(1) freedom
19 from disability-based discrimination is recognized as a civil right which includes

1 *but is not limited to* a series of specified circumstances. RCW 49.60.030 creates a
2 cause of action for anyone deeming himself injured by a violation of WSLAD. In
3 order to establish a case under RCW 49.60.030, Mr. Kral must show (1)
4 membership in a protected class; (2) that he was similarly situated to people
5 without a disability being considered for electronic home (3) because of his
6 deafness plaintiff's he was treated differently than people who are not deaf.
7 *Marquis v. City of Spokane*, 130 Wn.2d 97, 113 (1996) Mr. Kral has shown that he
8 is deaf. There is no doubt that he was being considered for electronic home
9 monitoring. Defendants turned down Mr. Kral for home monitoring because he is
10 deaf.

11 **Plaintiff has established a *prima facie* case under RCW 49.60.215.**

12 Mr. Kral has a civil right to be free from disability-based discrimination
13 which *includes but is not limited to* freedom in the advantages of places of public
14 accommodations. RCW 49.60. 030(1)(b). A place of public accommodation is
15 defined by RCW 49.60.040(2) defines pace of public accommodation *to include*
16 *but not be limited to* places where charges are made for service or use of facilities
17 or rendering personal services. *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508,
18 525 (2001) describes the elements of a *prima facie* public accommodation case: 1)

1 the plaintiff has a disability; 2) defendant's establishment is a place of public
2 accommodation; 3) defendant discriminated against plaintiff by providing
3 treatment that was not comparable to the level of designated services provided to
4 individuals without disabilities; and 4) the disability was a substantial factor
5 causing the discrimination.

6 Mr. Kral has shown that he is deaf, a disability within the scope of RCW
7 49.60.040(7)/215. Mr. Kral has also established the second element of a *prima*
8 *facie* case. WASPC operates a place that makes a charge for rendering personal
9 services (electronic home monitoring). King County operates many places
10 (including its district courts and its jails where people gather for public purposes,
11 one of the definitions of public accommodation set forth in RCW 49.60.040(2).

12 Mr. Kral was not comparably to non-deaf people ordered to participate in
13 electronic home monitoring. Finally, Mr. Kral's disability was a substantial factor
14 in causing the discrimination. Mr. McMillan expressly told the District Court that:

15 William Kral us deaf and will not be able to be put on EHM
16 with BAC for that reason. The testing operators have to
17 physically talk to them every time they call. His people at home
18 are not willing to be at home during the test times.

19 McMillan Dep. Ex. 4.

1 **Mr. Kral has established *prima facie* cases under the ADA.**

2 Defendant King County is a public entity, as defined by 42 USC 12131(1) In
3 order to show that King County violated Title II of the ADA, Mr. Kral must show:
4 (1) he is a "qualified individual with a disability"; (2) he was either excluded from
5 participation in or denied the benefits of a public entity's services, programs, or
6 activities, or was otherwise discriminated against by the public entity; and (3) such
7 exclusion, denial of benefits, or discrimination was by reason of his disability.

8 *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) Mr. Kral is a
9 qualified individual with a disability because he is deaf and is a party to a lawsuit
10 involving public hearings. *Duvall v. County of Kitsap* at 1136 and the definition of
11 qualified individual with a disability at 42 USC 12131(2). He was excluded from
12 the EHM program, and, as demonstrated by Ex. 4 to McMillan's deposition, the
13 exclusion was by reason of his disability.

14 The fact that King County relied on WASPC to provide EHM service does
15 not shield the County from liability. One of the federal regulations applicable to
16 this case, 28 CFR 35.130, prohibits King County from using contractual or other
17 arrangements to deny service to a qualified individual with a disability. Another
18 regulation, 28 CFR 35.160(b)(1) requires King County to provide appropriate

1 auxiliary aids and services that would give Mr. Kral an opportunity to participate
2 in EHM. He cannot be subjected to a surcharge for auxiliary aids and services. 28
3 CFR 35.160(f). King County has to give primary consideration to Mr. Kral's
4 request as to the type of auxiliary aid and service necessary. 28 CFR 35.160(b)(2).

5 Defendant WASPC is a place of public accommodation within the definition
6 of 42 U.S.C. 12181(7)(F) and (K) because it provides social services. Mr. Kral was
7 denied the use of those services in violation of 42 U.S.C. 12182. WASPC is
8 required by 42 U.S.C. 12182(2)(A)(ii) to make reasonable modifications to its
9 practices and procedures in order to accommodate Mr. Kral's deafness. The record
10 in this case makes it clear that Defendant WASPC did not make, or even consider,
11 any such modifications.

12 **CONCLUSION**

13 Mr. Kral has shown that all the elements of *prima facie* cases under the
14 ADA and WSLAD. Plaintiff respectfully requests that the Court grant his motion
15 for partial summary judgment.

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2 Respectfully submitted this 29th day of December, 2011.

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4 s/Lonnie Davis

5 WSBA No. 5091

6 Attorney for Plaintiff

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PLAINTIFF'S MOTION FOR
FOR SUMMARY JUDGMENT - 10

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